

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
UPPER MISSOURI DIVISION
GALLATIN RIVER BASIN (41H)
PRELIMINARY DECREE

* * * * *

CLAIMANT: David Bos

CASE 41H-0487-R-2022
41H 150739-00

ORDER ON OBJECTION TO MASTER'S REPORT

David Bos ("Bos") objects to the Master's Report in this case. For the reasons set forth in this Order, the Court accepts the objection as a motion for relief from an order and grants the motion to amend Bos previously filed.

BACKGROUND

On May 25, 2018, David and Marilyn Bos filed proposed amendments to correct the point of diversion legal description for claim 41H 150739-00 and to modify the place of use for claim 41H 150743-00. The Court accepted the proposed amendments as a motion to amend. Because the timing of the proposed amendments was close to the issuance of the Preliminary Decree for the Gallatin River Basin (Basin 41H), the Court issued a closing order on June 29, 2018, without ruling on the merits of the amendments, stating:

[T]he Motion to Amend will be placed in the respective claim files and held there until the next decree is issued, later this year. The Amendments will be addressed at that time.

The Court issued the Basin 41H Preliminary Decree on October 11, 2018. The preliminary decree abstracts for both claims include an issue remark referring to the motion to amend. The issue remark for claim 41H 150739-00 states:

AN AMENDMENT WAS SUBMITTED ON 5/25/2018 REQUESTING TO AMEND THE POINT OF DIVERSION. THE AMENDMENT WAS NOT PROCESSED. THE AMENDMENT WILL BE REVIEWED AFTER THE ISSUANCE OF THE PRELIMINARY DECREE.

After issuing the Preliminary Decree, the Court consolidated the two claims in two different cases. The Court consolidated claim 41H 150743-00 in case 41H-0233-R-2022 because it also had a decree exceeded issue remark, other issue remarks, and received an objection. The claim later was reconsolidated in case 41H-0231-R-2022. On December 27, 2022, the Court issued a closing order in that case. As part of the order, the Court granted the 2018 motion to amend for claim 41H 150743-00 and corrected the place of use as the Bos's originally requested.

The Court consolidated claim 41H 150739-00 in this case because it did not receive objections and did not have issue remarks that overlapped with other claims owned by third parties. On June 2, 2022, the Senior Water Master issued an order setting a July 25, 2022 filing deadline for Bos¹ to respond with evidence to support the proposed amendment. Bos did not respond by the deadline. On August 3, 2022, the Master issued a Master's Report recommending dismissal of the motion to amend and removal of the issue remark.

On August 16, 2022, Bos objected to the Master's Report, contending the failure to respond was due to counsel's excusable neglect. Specifically, Bos contends counsel inadvertently confused this claim with claim 41H 150743-00, which still was actively

¹ On May 20, 2022, ownership of claim 41H 150739-00 was updated to remove Marilyn Bos as a joint owner.

involved in the separate case ongoing at the same time. Bos requests the Court address the motion to amend on its merits.

ISSUES

1. Does Bos establish sufficient excusable neglect for the Court to grant relief from the recommendations in the Master's Report and address the motion to amend on the merits?

2. Does the motion to amend prove that claim 41H 150739-00 should be modified to add a second point of diversion?

DISCUSSION

A. Does Bos demonstrate sufficient excusable neglect?

When a party objects to a master's report, the Court reviews a water master's findings of fact for clear error, and the water master's conclusions of law for correctness. *Heavirland v. State*, 2013 MT 313, ¶ 14, 372 Mont. 300, 304, 311 P.3d 813, 817. The Court "must accept the master's findings of fact unless clearly erroneous." M.R.Civ.P. 53(e)(2). Based on these standards of review, the water judge "may adopt, modify, or reject the [Master's] report, in whole or in part, or may receive further evidence or recommit it with instructions." Rule 23, W.R.Adj.R.

The Master's Report concluded Bos no longer wished to pursue the amendment to claim 41H 150739-00 because Bos did not file evidence by the deadline set in the consolidation order. The Master's Report cites § 85-2-248(9), MCA. The referenced statute authorizes removal of an issue remark for failure to comply with a court order. The Master's Report also cites Rule 22, W.R.Adj.R. which provides general authority to issue appropriate sanctions or orders after noncompliance with an order.

Bos does not directly challenge the Master's Report's findings of fact or conclusions of law under the typical objection standards. Instead, Bos argues the Court should excuse the failure to respond by the deadline due to the neglect of counsel. Thus, rather than a direct objection to the merits of the Master's Report, Bos's objection is more of a motion requesting consideration of matters outside the scope of the what the Master's Report addressed.

The Water Court relies on water masters to assist in resolving issue remarks and objections to claims. Rule 11, W.R.Adj.R. The scope of a water master's role is defined by the statute and the Court's adjudication rules. Section 3-7-311(1), MCA; Rule 11(c), W.R.Adj.R. The adjudication rules specify that a water master has the general powers and duties granted to a master by Rule 53(c), (d), and (e), M.R.Civ.P. As interpreted by the Montana Supreme Court, issuance of a master's report effectively terminates the master's administration of the case and transfers it back to the Court. *Patton v. Patton*, 2015 MT 7, ¶ 34, 378 Mont. 22, 31, 340 P.3d 1242, 1249 (standing master case). If a motion is filed after issuance of a master's report, the Court may either consider the motion or recommit the case to the master with instructions to rule on the motion. Based on this framework, the Court finds no error in what the Master's Report recommended, but accepts Bos's request for relief as a Rule 60 request filed directly with the Court.

Bos cites the excusable neglect standard in Rule 60 as the basis for the request. This rule states:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.

Rule 60(b)(1), M.R.Civ.P.

Bos asks the Court to evaluate his request under the standard articulated by the Supreme Court to address requests to set aside default judgments under Rule 60(b)(1). The standard allows a court to grant relief when four elements are met: (1) the defaulting party proceeded with diligence; (2) the defaulting party's neglect was excusable; (3) the judgment, if permitted to stand, will affect the defaulting party injuriously, and (4) the defaulting party has a meritorious defense to plaintiff's cause of action. *Blume v. Metropolitan Life Ins. Co.*, 242 Mont. 465, 791 P.2d 784 (1990), *overruled in part by JAS, Inc. v. Eisele*, 2014 MT 77, ¶ 34, 374 Mont. 312, 321 P.3d 113 (determining the court in *Blume* erred to the extent that it imported the Rule 55(c) good cause standard into its analysis of a default judgment). Although the Master's Report did not recommend

termination of claim 41H 150739-00 – which would be analogous to a default – the four-part test is appropriate to evaluate the relief Bos seeks.

Bos was diligent in responding because he timely objected to the Master's Report and candidly brought the issue to the Court's attention within the objection timeframe specified in the report. Bos's neglect is excusable because the Court addressed two claims in one order when it issued its 2018 closing order, but then put each claim in a different case during the basin consolidation process. When Bos discovered the cases were on different tracks, Bos promptly brought the matter to the Court's attention.

As to injury, Bos properly filed a motion to amend, but the Court made the decision not to address it due to the Preliminary Decree timing, something outside of Bos's control. The Court signaled in the 2018 Closing Order that it would address the motion after the Preliminary Decree. If the Court does not address the motion now, Bos might be forced to refile the motion as a post-decree motion to amend, with the potential requirement to provide additional notice. In contrast, notice of the pending motion was provided via the issue remark and Preliminary Decree objection list. The claim did not receive any objections or notices of intent to appear. On balance, Bos will be injured procedurally if the Court does not address the motion now.

Bos also meets the final factor to show the request is meritorious, as more particularly addressed in the next section. The Court concludes Bos makes a proper case of excusable neglect for the Court to address the motion on the merits.

B. Motion to Amend.

The motion to amend Bos submitted in 2018 asks for a simple correction to the legal land description for the point of diversion for this claim. The Preliminary Decree describes the point of diversion as the NWSWNW of Section 27, Township 3 South, Range 5 East. According to the motion, the legal description of the actual location of the point of diversion is the NENSW of Section 27, Township 3 South, Range 5 East. Bos supported the motion with a map prepared by DNRC that depicts the actual location of the point of diversion.

Section 85-2-233(6), MCA and Rule 10, W.R.Adj.R. authorize motions to amend. When a party seeks to amend elements of their own water right claim, the party must prove by a preponderance of evidence that the proposed modification overcomes the prima facie status of the claim. Rule 19, W.R.Adj.R.; *Nelson v. Brooks*, 2014 MT 120, ¶ 34, 375 Mont. 86, 329 P.3d 558.

Bos's motion to amend meets this standard. The motion seeks only to correct the legal land description for one point of diversion. The motion is supported by a map depicting the correct location. Although the motion does not contain a narrative explanation of the proposed new description, Bos provided the necessary information in the objection. The motion will not impact other water users because it does not move the described point of diversion upstream or downstream, does not change the number of points of diversion, and does not seek to modify any other element of the claim.

ORDER

Therefore, it is ORDERED that (1) the Rule 60(b) request for relief, and (2) the motion to amend claim 41H 150739-00 both are GRANTED. The Master's Report is approved to the extent it removes the issue remark from claim 41H 150739-00. The Master's Report is otherwise modified consistent with this order. The claim and this case are CLOSED.

This Order includes a modified post-decree abstract of claim 41H 150739-00 to confirm the modifications to the claims are made in the State's centralized water rights record system.

ELECTRONICALLY SIGNED AND DATED BELOW

Service via USPS Mail:

David Bos
4121 Kent Spur Rd
Bozeman, MT 59718-8335

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**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
GALLATIN RIVER
BASIN 41H**

Water Right Number: 41H 150739-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: DAVID BOS
4121 KENT SPUR RD
BOZEMAN, MT 59718 8335

Priority Date: JUNE 1, 1871

Type of Historical Right: DECREED

Purpose (use): IRRIGATION

Irrigation Type: FLOOD

Flow Rate: 1.25 CFS

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 300.00

Source Name: SOUTH COTTONWOOD CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NENWSW	27	3S	5E	GALLATIN

Period of Diversion: APRIL 1 TO OCTOBER 15

Diversion Means: HEADGATE

Ditch Name: HENRY DITCH

Period of Use: APRIL 1 TO OCTOBER 15

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	300.00		E2	9	3S	5E	GALLATIN

Total: 300.00

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

150739-00

150740-00

150741-00

150743-00

150744-00